No. 10461.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

WILLIAM GRAY SMITH, as Administrator with will annexed of the Estate of Olive Will- Wagstaff, Deceased, and J. A. WAGSTAFF,

Appellees.

Upon Appeal from the District Court of the United States for the Southern District of California.

BRIEF FOR THE UNITED STATES.

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No. 10404.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PHILIP GREY SMITH, as Administrator with will annexed of the Estate of Olive Wills Wigmore, Deceased, and J. A. WIGMORE,

Appellees.

Upon Appeal from the District Court of the United States for the Southern District of California.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The opinion of the District Court [R. 13-18] is reported at 48 F. Supp. 250.

Jurisdiction.

This is a suit to collect income taxes for the calendar year 1933 in the amount of $2,981.27, together with interest thereon as provided by law. The taxes were assessed against Olive Wills Wigmore and J. A. Wigmore jointly on October 16, 1936. [R. 21-22.] Taxpayers having failed, after notice and demand, to pay the taxes assessed,

the United States instituted suit on October 15, 1942, against the estate of Olive Wills Wigmore, deceased, and J. A. Wigmore in the District Court to collect the taxes pursuant to Section 276(c) of the Revenue Act of 1932. [R. 2-6.] The answer of Philip Grey Smith, administrator with will annexed of the estate of Olive Wills Wigmore, was filed on November 9, 1942. [R. 6-8.] J. A. Wigmore was not served with process and entered no appearance. [R. 25-26.] On January 8, 1943, the District Court entered judgment against the United States.[1] [R. 25-26.] Notice of appeal was filed on March 30, 1943. [R. 27.] Jurisdiction of this Court is invoked under Section 128(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Whether a joint taxpayer who signed an assessment waiver intended to extend the time for assessment of tax as against herself, even though her name did not appear in the body of the waiver.

Statute Involved.

Revenue Act of 1932, c. 209, 47 Stat. 169:

"SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this title shall be assessed within two years

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[1]This suit was also one to collect income taxes assessed against Olive Wills Wigmore for the year 1940. [R. 2-6.] Collection of these taxes was not opposed by the administrator of her estate. The judgment of the District Court, therefore, was in favor of the United States as to the unpaid income taxes for the year 1940. [R. 26.] That part of the District Court's judgment is not before this Court on appeal.

after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * * * * *

SEC. 276. SAME—EXCEPTIONS.

* * * * * * * *

(b) *Waivers.*—Where before the expiration of the time prescribed in section 276 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(c) *Collection After Assessment.*—Where the assessment of any income tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

Statement.

The facts found by the District Court which are material to the question on appeal are as follows [R. 18-22]:

Olive Wills Wigmore and her husband, J. A. Wigmore, filed a joint federal income tax return for the year 1933 on March 13, 1934. The return disclosed no tax liability. [R. 20.]

On January 17, 1936, J. A. Wigmore and Olive Wills Wigmore signed a consent in form as follows [R. 20-21]:

> "Consent Fixing Period of Limitations Upon Assessment of Income and Profits Tax.
>
> Cleveland, Ohio, January 17, 1936
>
> In pursuance of the provisions of existing Internal Revenue Laws J. A. Wigmore, a taxpayer (or taxpayers) of Chesterland, Coauga County, Ohio, and the Commissioner of Internal Revenue hereby consent and agree as follows:
>
> That the amount of any income, excess-profits or war-profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year (or years) 1933 under existing acts, or under prior revenue acts, may be assessed at any time on or before June 30, 1937, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the

Commissioner is prohibited from making an assessment and for sixty days thereafter.

J. A. WIGMORE
Taxpayer
OLIVE W. WIGMORE
Taxpayer
By.....
[Seal] GUY T. HELVERING
Commissioner of Internal Revenue
By A. C. C.

January 31, 1936

If this consent is executed with respect to a year for which a joint return of a husband and wife was filed, it must be signed by both spouses, except that one spouse may sign as the agent for the other. * * *"

On October 16, 1936, the Commissioner of Internal Revenue assessed income taxes for the year 1933 in the amount of $2,981.27, together with interest thereon, against Olive Wills Wigmore and J. A. Wigmore jointly. [R. 21-22.] No part of the tax and interest so assessed has been paid. [R. 22.]

Olive Wills Wigmore died on March 1, 1941, a resident of Pasadena, California. [R. 19.] Philip Grey Smith is the duly appointed, qualified, and acting administrator with will annexed of her estate. [R. 20.]

Olive Wills Wigmore did not consent that income taxes for 1933 would be assessed on or before June 30, 1937, or at any time after March 15, 1936.[2] [R. 22.]

The District Court concluded as a matter of law that the consent or waiver of the statute of limitations signed by J. A. Wigmore and Olive W. Wigmore on January 17, 1936, was ineffective as to Olive Wills Wigmore and her estate; that it did not extend the time within which the Commissioner of Internal Revenue might assess income taxes for 1933 against her; and that the statute of limitations barred assessment of income taxes for 1933 against Olive Wills Wigmore after March 15, 1936. [R. 23.]

Statement of Points to Be Urged.

The Government's statement of points, all of which are relied on here, is set out at pages 32-34 of the record. They may be condensed into one principal point, which will form the basis for the argument:

The consent signed by Olive W. Wigmore on January 17, 1936, was effective to extend the period of limitations for assessment against her of income taxes for 1933.

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[2]Although labeled a finding of fact, this obviously is a conclusion of law, based on the District Court's conclusion as to the validity of the consent or waiver.

Summary of Argument.

Whether a consent is effective to extend the period of limitations for assessment of taxes depends upon whether the person who signed it intended to consent to such extension. Olive Wills Wigmore and J. A. Wigmore filed a joint income tax return for 1933 and both signed the consent extending the time for assessment of 1933 taxes of "J. A. Wigmore." Despite the inapt wording of the consent, Olive W. Wigmore obviously signed the consent with the purpose of extending the time for assessment on the joint return as against herself. Her consent was not required to extend the time as to J. A. Wigmore. The law will not presume that she intended to do only an unnecessary and futile thing in signing, but will ascribe the obvious purpose to her act, that of consenting to extend the time on her own behalf. This is in accord with the rule generally employed in construing suretyship and other contracts. This *prima facie* showing that the waiver was operative against Olive Wills Wigmore was not rebutted by evidence and because a statute of limitation is involved no doubt may be resolved in her favor. Neither is it open to the administrator of her estate to deny validity to a consent upon which the Commissioner has relied.

ARGUMENT.

The Consent Signed by Olive Wills Wigmore on January 17, 1936, Was Effective to Extend the Period of Limitations for Assessment Against Her of Income Taxes for 1933.

The only question presented is whether an assessment of 1933 income taxes against J. A. Wigmore and Olive Wills Wigmore (hereinafter referred to as decedent) made on October 16, 1936, was barred by the statute of limitations. [R. 11-12.] This in turn depends on the validity of a consent executed on January 17, 1936, which purported to extend the time for assessment until June 30, 1937, [R. 10.] Unless this consent was operative, the assessment was not timely made under Section 275(a) of the Revenue Act of 1932, *supra,* which required that the assessment be made within two years from March 13, 1934, the date of filing the return.

The District Court held that the consent was invalid as against decedent[3] because her name did not appear in the body of the consent. [R. 13-18.] We contend that decedent clearly intended the consent to be operative against herself and that the District Court erred in holding that it was ineffective as to her.

The practice of executing consents or waivers extending the statutory period for assessment and collection of taxes

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[3]The validity of the consent as against J. A. Wigmore is not in question. Although he was named as a defendant in the instant suit, he was not served with process and the District Court rendered no judgment as against him.

has long existed[4] and the principles with respect to the nature of such consents have become settled.

The purpose of a consent extending the time for assessment of taxes, of course, is to give further time in which to ascertain the correct tax liability. *Stange v. United States,* 282 U. S. 270. It benefits the taxpayer, in that he is given an opportunity to protest and negotiate in an effort to effect a reduction of a proposed additional assessment. *United States v. Krueger,* 121 F. (2d) 842 (C. C. A. 3d), certiorari denied, 314 U. S. 677.

A consent is not a contract but is a volutary unilateral waiver of a defense by a taxpayer. *Florsheim Bros. Co. v. United States,* 280 U. S. 453; *Stange v. United States, supra.* No consideration is required to support it. *Loewer Realty Co. v. Anderson,* 31 F. (2d) 268 (C. C. A. 2d), certiorari denied, 280 U. S. 558; *Stern Bros. & Co. v. Burnet,* 51 F. (2d) 1042 (C. C. A. 8th). The general rules applied to determine the validity of contracts are not applicable to determine the validity of a consent. *American Feature Film Co. v. Commissioner,* 11 B. T. A. 1271; *Republic Insurance Co. v. Commissioner,* 13 B. T. A. 568.

The effectiveness of a waiver depends on intent. If the parties who signed the consent intended to be bound by it, the consent will be enforced even though it may be imperfect or defective in form. *Crown Willamette Paper*

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[4]There was no specific statutory authority for waivers prior to Section 250(d) of the Revenue Act of 1921, c. 136, 42 Stat. 227. However, the Commissioner had authority to take waivers prior to that time under the broad administrative provisions of the earlier acts. *Aiken v. Burnett,* 282 U. S. 277.

Co. v. McLaughlin, 81 F. (2d) 365 (C. C. A. 9th); *Mulford v. Commissioner,* 66 F. (2d) 296 (C. C. A. 3d); *United States v. Southern Lumber Co.,* 51 F. (2d) 956 (C. C. A. 8th), certiorari denied, 284 U. S. 680; *Heiman Grocery Co. v. Crooks,* 44 F. (2d) 854 (W. D. Mo.), appeal dismissed, 50 F. (2d) 1077 (C. C. A. 8th); *Constitution Publishing Co. v. Commissioner,* 22 B. T. A. 426.

The facts in the case at bar clearly show that decedent intended to extend the time for assessment of 1933 taxes as against herself. A joint income tax return for the year 1933 was filed and signed by both decedent and her husband. [R. 9.] Then, as the stamp in the upper left-hand corner of the return indicates, a revenue agent in report dated January 10, 1936, recommended a deficiency in tax for that year of $2,580.82, together with interest of $400.45. [R. 9.] Thereupon, on January 17, 1936, J. A. Wigmore and decedent executed the consent in question [R. 10], obviously for the purpose of securing time to protest the proposed deficiency in tax.

The body of the consent purports to extend the time for assessment of taxes due on the 1933 return filed by J. A. Wigmore. However, the only return filed by him for that year was the joint return, which was also the return of decedent. Since no other return was filed for that year, the consent manifestly was intended to refer to the joint return. *Cf. Mulford v. Commissioner, supra.*

Decedent must have intended something by her signature. If her only purpose was to extend the time for

assessment as to J. A. Wigmore, it was pointless for her to sign, for her signature added nothing. His signature alone would have accomplished that. It can not be presumed that her signature was for no purpose. On the contrary, it "must be assumed that an effective and not a futile act was intended." *Stange v. United States,* 282 U. S. 270, 277. No reason appears for her signature except that of extending the time in which an assessment could be made against her. The intent to extend the time necessarily follows.[5] Although the language of the consent was not as apt as it might have been, there is no basis for denying its obvious purpose. *Burnet v. Railway Equipment Co.,* 282 U. S. 295, 302; *Mulford v. Commissioner, supra.*

No case has been found in which the question involved here was presented.[6] The District Court [R. 16] relied upon the decision of this Court in *Commissioner v. Bryson,* 79 F. (2d) 397, as analogous. However, we think that case is not in any way comparable. There a waiver, purporting to be a consent by a corporation, was signed by

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[5]As indicated above, the District Court found that decedent "did not consent" to the assessment of income taxes for 1933 on or before June 30, 1937. [R. 22.] We think it clear that this was a conclusion of law and not of fact. Footnote 2, *supra.* But even if it be regarded as an ultimate finding of fact, it is merely an interpretation of the written consent which she signed. There was no other evidence except for the income tax return and the assessment list. Accordingly, this Court is free to construe the consent for itself. *Commissioner v. Buck,* 120 F. (2d) 775, 779 (C. C. A. 2d); *Commissioner v. Wilson,* 125 F. (2d) 307, 309 (C. C. A. 7th).

[6]*United States v. Hammerstein,* 20 F. Supp. 744 (S.D. N.Y.), involved a suit against husband and wife to collect a deficiency assessed against the husband only pursuant to a waiver signed only by him. The court refused to hold the wife liable in the absence of an assessment against her, even though a joint return had been filed. *Cf.* also *Ekdahl v. Commissioner,* 18 B. T. A. 1230; *Weinstein v. Commissioner,* 33 B. T. A. 105.

Bryson as former secretary. In a letter accompanying the consent Bryson disclaimed any authority to act for the corporation. This Court held that the waiver did not extend the time for assessment of taxes against the corporation because it was not executed by any officer with authority to act; and that it did not extend the time as to Bryson individually because he signed as former secretary and not individually. If the case applies here at all, it is to show that the intent of the parties is determinative. Decedent in the instant case signed on her own behalf and not as agent for another or as former secretary, as did Bryson; and she did not accompany her consent with a letter limiting the scope of her signature in any way, as did Bryson. Not having qualified her signature in any respect, decedent's intention to be bound individually clearly appears. The District Court erred in not holding her consent to be effective.

Although the District Court recognized that a waiver was not a contract [R. 14-15], it thought that the rules for construction of contracts should be used in construing a waiver.[7] It then applied in favor of decedent a principle that when a contract states distinctly that it is between two designated parties, the fact that another person signed the contract does not make it his contract. We do not think the principle relied on by the District Court applies when the intention to be bound on the contract exists. The

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[7]Other cases have so held. *Cf. H & B American Mach. Co. v. United States,* 11 F. Supp. 48 (C. Cls.), certiorari dismissed, 297 U. S. 726; *Constitution Publishing Co. v. Commissioner,* 22 B. T. A. 426.

great weight of authority supports the rule that the intention of the parties determines whether one whose name is signed but who is not named in the body of the contract is bound thereby. See *Gloucester Mutual Fishing Ins. Co. v. Boyer,* 294 Mass. 35, 200 N. E. 557; *Schonberger v. Culbertson,* 231 App. Div. 257, 247 N. Y. S. 180; *Stouts v. Wilson Motor Co.,* 176 Okla. 316, 55 P. (2d) 990. One who signs a bond will be regarded as a surety, although his name is not mentioned in the body of the bond. In such case it is presumed that he had some purpose in signing and that his intention was to be bound. *Wheeler v. Paterson,* 64 Minn. 231, 66 N. W. 964; *Sanders v. Keller,* 18 Idaho 590, 111 Pac. 350; *Smith v. Easter,* 101 Kan. 245, 166 Pac. 510; *Campbell v. Rotering,* 42 Minn. 115, 43 N. W. 795; *Stewart v. Carter,* 4 Neb. 564; *Affeld v. The People,* 12 Ill. App. 502; *Holden v. Tanner,* 6 La. An. 74.

Thus, in construing contracts the question of intent is of primary importance in ascertaining whether one who signed a contract is bound thereon. And as in the case of waivers, the fact that a person signs a contract creates a presumption that he intended to be bound thereon. But even if all contracts were required to be construed as the District Court thought, that rule of interpretation would not apply in the case of a waiver. It is established that the test to be applied in determining whether a consent is operative is whether the person signing intended to consent in fact. *Commissioner v. Bryson,* 79 F. (2d) 397 (C. C. A. 9th); and cases cited above.

Although it is not clear to what extent its decision was influenced, the District Court surmised that the omission of decedent's name from the body of the waiver may have been because liability for the 1933 taxes rested primarily upon the husband.[8] [R. 17.] That inference is not permissible. If it were true that the decedent was not liable for the taxes, that fact would assuredly have been asserted as a defense. The answer of decedent's administrator, however, raised no question with respect to decedent's liability for the 1933 taxes [R. 6-8], and consequently her liability was in effect conceded. The sole question before the District Court and this Court is whether the consent signed by decedent is operative as to her.

The District Court also held that there was doubt as to whether decedent was bound on her waiver and that this doubt should be resolved in favor of her estate. [R. 17.] But in the case of statutes of limitations preventing col-

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[8]In *Cole v. Commissioner,* 81 F. (2d) 485, this Court held that spouses are not jointly and severally liable for the entire amount of tax assessed upon a joint return. The decision was followed in *Crowe v. Commissioner,* 86 F. (2d) 796 (C. C. A. 7th), and *Commissioner v. Rabenold,* 108 F. (2d) 639 (C. C. A. 2d). Subsequently, the Supreme Court decided *Helvering v. Janney,* 311 U. S. 189, and *Taft v. Helvering,* 311 U. S. 195, in which it approved the principle that a joint return is the return of a single "taxable unit." In view of these decisions the Court of Claims and the Board of Tax Appeals now hold that the liability on a joint return is both joint and several. See *Moore v. United States,* 37 F. Supp. 136 (C. Cls.), certiorari denied, 314 U. S. 619, rehearing denied, 314 U. S. 709; *Schoenhut v. Commissioner,* 45 B. T. A. 812; *Gillette v. Commissioner,* 46 B. T. A. 573; *Levy v. Commissioner,* 46 B. T. A. 1145. But the Circuit Court of Appeals for the Second Circuit has adhered to its former position. *Commissioner v. Uniacke,* 132 F. (2d) 781. See also *United States v. Rosebush,* 45 F. Supp. 664 (E.D. Wis.).

Section 51(b) of the Revenue Act of 1938, c. 289, 52 Stat. 447, expressly provides that spouses, who exercise the privilege of filing a joint return, are jointly and severally liable for the tax upon their aggregate income. This provision was inserted to quell any doubt as to the existence of such liability. H. Rep. No. 1860, 75th Cong., 3d Sess., pp. 29-30 (1939-1 Cum. Bull. (Part 2) 728, 749).

Thus we think that if the question of the decedent's liability for the tax were involved in this case, the present state of the authorities would indicate a holding that she was both jointly and severally liable.

lection of taxes which are clearly owed, the doubts are resolved in favor of the Government. Such statutes are to be strictly construed in its favor. *Dupont de Nemours & Co. v. Davis,* 264 U. S. 456; *Bowers v. N. Y. & Albany Co.,* 273 U. S. 346; *McCarthy Co. v. Commissioner,* 80 F. (2d) 618 (C. C. A. 9th). Where a waiver is regular in form, every presumption is to be taken in favor of its validity and binding effect, and the burden is on the taxpayer to show any invalidity or ineffectiveness. *Stern Bros. & Co. v. Burnet,* 51 F. (2d) 1042 (C. C. A. 8th); *Trustees for Ohio & Big Sandy Coal Co. v. Commissioner,* 43 F. (2d) 782 (C. C. A. 4th).

In the instant case, the Government introduced the 1933 joint return, the consent signed by decedent, and the assessment list. [R. 9-12.] From these the assumption must be made, as we have shown, that decedent's intent was to extend the time for assessment as against herself. *Stange v. United States,* 282 U. S. 270; *Mulford v. Commissioner,* 66 F. (2d) 296 (C. C. A. 3d); *Wheeler v. Paterson,* 64 Minn. 231, 66 N. W. 964. This made a *prima facie* case for the Government. The burden was then upon decedent's administrator to show by evidence that the waiver was inoperative as to her. He offered no proof of any kind and the case was submitted on the Government's documentary evidence. [R. 19.] There was, therefore, no conflict in the evidence and no doubt as to decedent's intention and as to the validity of the waiver in this case. But if any doubt had existed, it should have been resolved in favor of the Government in this type of case.

Lastly, the evidence shows that the Commissioner of Internal Revenue relied on the reality of the consent executed by the decedent. He deferred assessment of the

proposed additional taxes for 1933 until after the statutory period for assessment had expired. In such circumstances decedent's administrator is not permitted to say that decedent did not intend that which her signature indicated or that her consent did not have the effect of extending the period for assessment of taxes against her. *Liberty Baking Co. v. Heiner,* 37 F. (2d) 703 (C. C. A. 3d); *Trustees for Ohio & Big Sandy Coal Co. v. Commissioner, supra; Lucas v. Hunt,* 45 F. (2d) 781 (C. C. A. 5th); *Philip Carey Mfg. Co. v. Dean,* 58 F. (2d) 737 (C. C. A. 6th), certiorari denied, 287 U. S. 623; *Mulford v. Commissioner, supra; cf. Commissioner v. Bryson,* 79 F. (2d) 397 (C. C. A. 9th).

Conclusion.

The judgment of the District Court should be reversed.

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June, 1943.